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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1380~~ 151

LOUIS ZWICK and JOSEPH ZWICK, individually, and as co-partners of LOUIS ZWICK & SON, and LOUIS ZWICK & SON,

Petitioners,

v.

ORVILLE L. FREEMAN, as Secretary of Agriculture of the United States of America and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, made in the above entitled proceeding on February 14, 1967, denying a petition to review an Order of the Secretary of Agriculture.

Citations to Opinions Below

The decision of the Court of Appeals dated February 14, 1967, was reported in 353 F. 2d 110. It is printed as Appendix "A", *infra*. The decision of the Secretary of

Agriculture, dated January 12, 1966, was reported in 25 Agr. Dec. 90. It is printed in the Appendix before the Court of Appeals, pages 30a-62a, submitted herewith.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

1. Is it violative of the spirit and purpose of the Bankruptcy Act for a debtor to be deprived of the right to earn a livelihood, after his discharge in a Chapter XI proceeding, by an administrative order based upon findings that the debtor failed to pay the debts listed in his bankruptcy schedules.

2. In the absence of compelling public necessity, may a person be deprived of the right to earn a living for the reason that he did not pay his debts, and does a statute having such effect:

A.) Deprive a person of his property without due process of law,

B.) Constitute an excessive fine, and cruel and unusual punishment, and

C.) Constitute a bill of attainder.

3. Does the failure of a debtor, discharged in a proceeding under Chapter XI of the Bankruptcy Act, to fully pay the creditors listed in his bankruptcy schedule, constitute

"flagrant or repeated" violations of the Perishable Agricultural Commodities Act Section 2 (7 U. S. C. 499b) within the meaning of the Act.

Statutes Involved

This case involves Section 17 of the Bankruptcy Act, 11 U. S. C. sec. 35, Section 2, 7 U. S. C. 499b(4) and Section 8 (7 U. S. C. 499h) of the Perishable Agricultural Commodities Act (hereinafter the "Act"), the Fifth Amendment, the Eighth Amendment and Article I, Section Nine of the United States Constitution. The Statutes are printed as Appendix "B", *infra*.

Statement of the Case

Petitioners, wholesale fruit and vegetable merchants, filed a petition for relief under Chapter XI of the Bankruptcy Act. On February 25, 1965, they were discharged by the effect of the order confirming their Plan of Arrangement, wherein creditors were to receive thirty percent of their claims. The Department of Agriculture was kept informed of all phases of the Chapter XI proceeding as it progressed. Despite the releasing effect of the Order of Confirmation, thereafter, on September 13, 1965, a disciplinary proceeding was instituted against petitioners by the United States Department of Agriculture charging them with repeated and/or flagrant violations of Section 2 of the Act. In the administrative proceding the parties stipulated to the facts and waived oral hearing.

The Findings of Fact found (1) that petitioners failed to fully pay their creditors, (2) that all of such creditors were

listed in the schedules filed in the Chapter XI proceedings, (3) that debtors' Plan of Arrangement was duly confirmed, and (4) that an adverse survey made by certified public accountants retained by the Official Creditors Committee in the course of such proceedings found that there was no evidence of any irregularity or wrongdoing.

The Judicial Officer concluded that failure to promptly and fully pay for *each* purchase constituted a separate violation of the Act, and that failure to promptly and fully pay the *many* purchases made the violations repeated and flagrant.

Such conclusion automatically invokes the mandatory provision of Section 8 of the Act (7 U. S. C. 499h) which bars the employment of petitioners in the industry for a minimum of one year. Restoration to employable status after the one year bar is discretionary, and the sanction imposed may be permanent. Since the business and working experience of both petitioners is confined to the wholesale fruit and vegetable industry, the effect of the order is that they are deprived of the right to earn a living.

Petitioners sought judicial review of such determination by the United States Court of Appeals for the Second Circuit upon the grounds (1) that such failure to pay debts did not constitute "flagrant or repeated" violations of the Act, (2) that the disciplinary procedings, under such circumstances, were arbitrary, capricious and an improper exercise of discretion and (3) that Section 499h of the Act violates the Fifth and Eighth Amendments and Article I, Section Nine, of the Constitution. The petition to review was denied and the administrative order affirmed.

Reasons for Granting the Writ

Petitioners were forced to forego their rights to appeal to bring all of the questions involved in this case before the Court. The questions presented are important and recurring; they are also novel and of first impression. In an industry which extends to the four corners of the land, honest, insolvent debtors are being deprived of their right to earn a living solely because they are unable to pay their debts.

At a time when the philosophy of the law is vigorous and liberal, and the nation's thinking more socially-aware of the rights of the individual, the Perishable Agricultural Commodities Act has taken a giant backward step by depriving a class of people of property rights; of the benefit of the nation's bankruptcy laws; and by creating a punishment for failure to pay debts which is cruel and unjust.

This case is not singular but represents a multiplicity of similar administrative actions.

I

The Court of Appeals recognized that there are issues involved herein which are novel and of first impression. In its decision in the case at bar, it states:

> "We find no cases involving alleged conflicts between the Bankruptcy Act and other federal legislation, but there are a number of reported cases that hold that reasonable measures provided for in State Statutes which impose penalties on bankrupts are not invalid under the Supremacy Clause, United States Constitution, Article VI, Cl. 2, despite some

degree of conflict with the Bankruptcy Act." (Appendix "A", infra)

The Court of Appeals then referred to *Kesler* v. *Department of Public Safety of Utah,* 369 U. S. 153 (1962), and *Reitz* v. *Mealey,* 314 U. S. 33 (1941) as the analogous situations, and determined that no such conflict exists herein. The cited cases, however, are clearly distinguishable from the case at bar. The *Kesler* and *Reitz* cases both involve the right of a State to enact legislation to protect the life and limb of its citizens, in the valid exercise of its police powers.

The language used by the Supreme Court in the *Reitz* case is most indicative of the reason for such decision:

> 'The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent.'"

In *Kesler,* answering the question of why it was upholding the statute the Court said:

> "Why? Because the 'police power' of a state, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the State and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6."

The compelling reason for these decisions, coupled with the sharp division of opinion amongst the several judges, are persuasive arguments that the doctrine of *Reitz* v. *Mealey* and *Kesler* v. *Department of Public Safety* should

not be further extended, and should not be used as the basis for further encroachment on the nation's bankruptcy laws.

The instant case presents no such compelling reason for denying to petitioners the social and economic rehabilitation mandated by the Bankruptcy Act. Petitioners, father and son, were wholesale fruit and produce merchants. As such, they did not deal with the public, but with suppliers and other wholesalers. They have not been found guilty of any wrongdoing. To the contrary, the Judicial Officer accepted the conclusion by the Official Creditors Committee's accountants, after an adverse survey, that there was no evidence of any irregularity or wrongdoing. They were found to have failed to fully and promptly pay their debts in purely commercial transactions.

The Court below has also held that the sanction imposed by the administrative agency is not a "provable debt" as defined by Section 63 of the Bankruptcy Act, and, accordingly, there is no direct conflict between the provision of the Act and the Bankruptcy Act. We do not claim that the sanction is a "provable debt". We do, however, urge that the imposition of the sanction nullifies the *effect* of the Bankruptcy Act, contravenes the goals it was intended to foster and is incompatible with its provisions. The prime purpose of the Bankruptcy Act is "to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes". *Williams* v. *United States Fed. & Guar. Co.*, 236 U. S. 549, 554-55, 35 S. Ct. 289, 291. What good are such profound protestations of intentions if the basic reasons therefore are to be regulated out of existence.

The harsh effect of denying to petitioners the protection of the Bankruptcy Act is heightened by the fact that they do not seek the right to hold a license, nor the right to go back to business, but solely the right to be employed in a common occupation of the community, in an industry to which their experience is limited.

II

A. The Fifth Amendment of the Constitution guarantees the property rights of the people. In *Truax* v. *Raich*, 239 U. S. 33, 38 (1915), Mr. Justice Hughes stated:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

This right is denied to petitioners by the provisions of Section 499h of the Act which automatically invokes the mandatory sanction of barring them from employment.

In *Kesler*, Chief Justice Warren stated that a preliminary inquiry must always be made into the policy behind the legislation alleged to be in conflict before final analysis. The policy behind the legislation is revealed by the testimony of George R. Grange, a Deputy Director of the United States Department of Agriculture in the hearing before the subcommittee of the Committee on Agriculture and Forestry, United States Senate, 87th Congress (Appendix "C", *infra*), and in H. R. Rep. No. 1546, 87th Congress, 2d Sess. (1962) (Appendix "D", *infra*). The Committee was then considering the amendment of the Act.

Prior to the amendment (effective August 15, 1963) the employment restriction was confined to employment "in

any responsible position". The amendment eliminated the restriction, so that now *any* employment, even as a salesman, truckdriver or porter, is prohibited. The purpose was to remove the temptation to do business by subterfuge. This reasoning would appear analogous to legislating that a motor vehicle operator whose license is suspended may not be a passenger in a car, since he might be tempted to drive. There was no valid public purpose for such amendment.

The due process clause of the Fifth Amendment demands that the law challenged shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained (*Porter* v. *Shibe*, 158 F. 2d 68 (1946); *Coxsey* v. *Halaby*, 231 F. Supp. 978 (1964). The instant law challenged meets none of these qualifications.

The Court of Appeals relied upon *Bradley* v. *Waterfront Comm'n of N. Y. Harbor*, 12 N. Y. 2d 276, 239 N. Y. S. 2d 97 (1963) and *DeVeau* v. *Braisted*, 363 U. S. 144 (1960) as analogous situations in support of its decision. Once again, the cases relied upon are fundamentally different from the instant case. They dealt with restrictions necessary for the public welfare. The sanctions there were imposed to put a stop to waterfront thievery and racketeering, and to racketeering in the unions. How could their standards be fairly applied in the case at bar?

B. It is respectfully urged that Section 499h of the Act constitutes a bill of attainder, prohibited by Article I, Section Nine of the Constitution. In the Court below we relied upon *United States* v. *Brown*, 381 U. S. 437 (1965) in sup-

port of such contention. It was there held that the *Brown* case was distinguishable in that the statute challenged herein does not name petitioners or any group to which they belong. If the reasoning of the lower Court is to be sustained, the following syllogism results, the conclusion of which is unavoidable as applied to fruit and produce merchants:

1. Failure to pay a single debt in full constitutes a violation of the Act; failure to pay more than one debt constitutes repeated and flagrant violations of the Act.

2. Disciplinary proceedings are imposable against such merchants even after their discharge in bankruptcy, carrying with it the sanction that they may not be employed in the industry.

3. The rehabilitation provisions of the Bankruptcy Act do not apply to any merchant in the wholesale fruit and produce industry.

We do not believe that it was the intention of the authors of the Bankruptcy Act to exclude a class of merchants who were debtors in purely commercial transactions. However, if failure to pay debts constitutes "repeated and/or flagrant violations", it appears to have been the clear intention of the authors of Section 499h to do so, and the Supreme Court should resolve this conflict.

In the *Brown* case, Chief Justice Warren stated that the Bill of Attainder clause reflected "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons". Chief Justice Marshall in *Cum-*

mings v. *State of Missouri*, 4 Wall. 277,320 (1867) defined punishment to include the disqualification from the pursuits of a lawful avocation.

We can discover the existence of no other group of merchants to whom so grave a punishment is applied for non-payment of purely commercial debts, except where necessity therefor is dictated by the public welfare, or where police power of the State is involved. Neither of these exceptions are involved herein.

C. Petitioners also contend that Section 499h constitutes a cruel and unusual punishment in violation of the Eighth Amendment. While conceding that this constitutional protection has been extended beyond technically criminal sanctions, it was held by the court below not to apply to purely civil penalties, citing *Trop* v. *Dulles*, 356 U. S. 86 (1958), *United States* v. *Strangland*, 242 F. 2d 843, 848 (7 Cir. 1957). In the *Trop* v. *Dulles* case, Chief Justice Warren, disregarding "labels" directed his inquiry to the substance rather than the form of the statute, and laid down the following rules:

> "If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."

Deprivation of a man's right to work in an industry to which his experience is confined, would indeed seem to constitute cruel and unusual punishment forbidden by the Eighth Amendment.

The Court below also held that, in any event, "as the sanction serves a valid public purpose", denial of the right of such employment cannot be considered as cruel or unusual punishment. We respectfully urge that a sanction which bars a man from employment in a non-responsible position, in purely commercial firms, not involving public welfare, because he was unable to pay his debts—serves no valid public purpose.

III

Finally, although petitioners failed to pay many debts, all incurred at different times, such acts do not constitute "repeated" or "flagrant" violations within the meaning of the Act. We have been unable to find any legal precedents defining these terms other than that of *Opolich* v. *Flukey*, 47 F. 2d 950 (1930) wherein deportation was sought because the deportee was a person sentenced to more than one term of imprisonment. In fact, he had been sentenced in one proceeding on four connected crimes of counterfeiting. The Court stated:

> "Possibly he may have been said to have been sentenced for all four, but it seems to me a great strain of language to say that he has been sentenced more than once. And in my opinion Congress had in mind what are commonly called 'repeaters', that is to say, persons who commit a crime and are sentenced and then commit another and sentenced again."

It is urged that the type of "repeater" Congress had in mind in enacting Section 499h was the habitual offender defined in the *Opolich* case, and not the honest insolvent debtor, never before in trouble. Webster's New Interna-

tional Dictionary defines "flagrant" as "extremely", "flauntingly", "notorious". Can the acts of these debtors, caught in the web of financial stress, properly be so defined? If so, every honest insolvent debtor in the fruit and produce industry would be tarred by such brush and barred from employment. This, the Congress could not have intended.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the order of the Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
May 10, 1967

Respectfully submitted,

SLAVIN & CARR,
Attorneys for Petitioners

APPENDIX A

Decision of United States Court of Appeals for the Second Circuit, Dated February 14, 1967

(353 F. 2d 110)

WATERMAN, *Circuit Judge*:

Petitioners seek to review an order of the Judicial Officer of the United States Department of Agriculture, acting for the Secretary of Agriculture, based upon his findings and conclusions that petitioners' partnership, Louis Zwick & Son, had engaged in repeated and flagrant violations of the Perishable Agricultural Commodities Act (hereinafter sometimes "Commodities Act") §2, 7 U. S. C. §499b(4).[1] The individual petitioners seek review because the effect of this order under 7 U. S. C. §499h(b) results in barring them from employment by any licensee under the Commodities Act for a minimum period of one year because they were "responsibly connected" with the partnership licensee against which the order was issued.:[2]

---

[1] This court has jurisdiction to determine the validity of the order under 5 U. S. C. §1031 et seq.

Here the Department served its complaint upon petitioners, petitioners answered and, pending a hearing before the Judicial Officer, the parties entered into a stipulation as to the facts, waived hearing and oral argument and consented that the matter be referred directly to the Judicial Officer for determination. Thereafter the Judicial Officer entered a tentative order and final order. The final order is the subject of the appeal.

[2] Employment may be approved by the Secretary after one year if they furnish a surety bond satisfactory to the Secretary, or approved after two years without bond. 7 U. S. C. §499h(b).

7 U. S. C. §499h(b) reads as follows:

> §499h. Grounds for suspension or revocation of license.
>
> * * *
>
> (b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment with-

The facts underlying the proceedings were not disputed and the parties entered into a stipulation which was the

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out bond; change in amount of bond; payment of increased amount; penalties.

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

basis of the Judicial Officer's determination. The stipulation indicates that petitioners Louis Zwick and Joseph Zwick were engaged in business as partners under the name Louis Zwick & Son. The partnership conducted business in New York City and had been licensed under the Perishable Agricultural Commodities Act as a commission merchant and dealer since August 1947, said license having been renewed annually. Between May 1963 and August 1964 Louis Zwick & Son received 132 lots of fruits and vegetables from seven shippers, sold them, and failed to pay for them. Between June and August 1964 the partnership received 20 lots of fruits and vegetables from five shippers on a joint account basis, sold them and failed to pay for them. Between January 1961 and September 1964 the partnership purchased and received 140 lots of perishable agricultural commodities from 22 shippers but failed to pay for them although some installment payments were paid upon purchases made prior to 1964. During 1963 and 1964 the partnership engaged various brokers to negotiate purchases on its behalf. Three brokers negotiated such purchases, earned their fees, and were not paid by the partnership. In summary, Louis Zwick & Son failed to pay sums due upon 295 transactions covered by the Commodities Act and owed a total of $254,394.55.

On September 25, 1964 the partnership filed a petition in bankruptcy under Chapter XI and submitted a plan of arrangement by which it offered to pay creditors 30% on their claims. The schedules filed in these proceedings listed all the creditors in the 295 transactions described above. The plan of arrangement was approved and confirmed by the Referee by an order dated February 25, 1965. The bankruptcy proceedings included a report that an adverse survey of the partnership books by certified public accountants showed no evidence of irregularity or wrongdoing on the part of the partnership. The license of the partnership

under the Commodities Act terminated automatically upon the approval of the plan.

Petitioners object to the Judicial Officer's findings and order on a number of grounds which we will consider in turn. We find no merit to any of their contentions and we therefore deny their petition to review the Judicial Officer's order.

Petitioners first contend that their failure to make full payment to their creditors in the 295 transactions described above does not constitute repeated or flagrant violations within the meaning of the statute. Their argument seems to be that inasmuch as the violations were mainly in one short period during the spring and summer of 1964, when petitioners were in the process of becoming insolvent, all the violations should be considered together as one bundle of violations in point of time and not as "repeated" violations in a continuing series of violations. This is a strained interpretation of a common word which we must interpret in its conventional sense. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364 (1953); *Folker* v. *Johnson*, 230 F. 2d 906, 907 (2 Cir. 1956). The 295 violations did not occur simultaneously and therefore they must be regarded as "repeated" violations within the meaning of the Commodities Act.

Petitioners likewise attack the Judicial Officer's conclusion that their violations were "flagrant" although the report filed in the bankruptcy proceeding showed that there was no evidence of wrongdoing on their part. As the statute only requires a finding that the violations are repeated *or* flagrant[3] and we have already found them to be "repeated" it is not necessary also to find them to be "flagrant" in order to support the Judicial Officer's conclusion. But we think that these 295 violations were in fact

[3] 7 U. S. C. §§499d(b)(B), 499h(b)2.

"flagrant" violations within the meaning of the statute. Petitioners' reference to the report filed in the bankruptcy proceeding which showed that there was no evidence of wrongdoing on their part is an irrelevant reference for it is clear that the failures of the petitioners to pay the accounts that caused the institution of the bankruptcy proceedings made petitioners guilty of flagrant violations of the Perishable Agricultural Commodities Act before the bankruptcy proceedings were ever instituted. As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

The next contention of the petitioners is that the institution of the within proceedings before the Judicial Officer pursuant to the Perishable Agricultural Commodities Act after the order of confirmation of petitioners' plan of arrangement under the Bankruptcy Act contravened Section 17 of the Bankruptcy Act and the goals the Bankruptcy Act was intended to foster.

Section 17 of the Bankruptcy Act, 11 U. S. C. §35 provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts." To be sure, a discharge is intended to accomplish just exactly that, offering the bankrupt a fresh start in life. However, the discharge provided by Section 17 does not extinguish debts; it only bars, if pleaded, legal proceedings to enforce payment of the discharged debts. *Helms* v. *Holmes,* 129 F. 2d 263, 266 (4 Cir. 1942); 1 Collier, Bankruptcy ¶17.27 at 1693 (14th ed. 1966). Only "provable debts" are discharged by the

operation of Section 17; all other obligations of the bankrupt remain in full force. *Crawford* v. *Burke,* 195 U. S. 176, 186 (1904); 1 Collier, Bankruptcy, ¶17.03 at 1580 (14th ed. 1966).

"Provable debt" is defined in §63 of the Bankruptcy Act and "debt" is defined somewhat circuitously in §1(14) of the Bankruptcy Act which states " 'Debt' shall include any debt, demand, or claim provable in bankruptcy." While "debt" in the bankruptcy law is not restricted to its strict legal meaning, *In re Fife,* 109 Fed. 880 (W. D. Pa. 1901) it does require that something be "owed" to the creditor. *In re A & G Knitting Mills,* 144 F. 2d 125 (3 Cir. 1944); *In re Greenbaum Bros. & Co.,* 62 F. Supp. 769 (E. D. Pa. 1945); 3 Collier Bankruptcy ¶63.02 at 1762 (14th ed. 1966); cf. *Ivanhoe Building & Loan Assn.* v. *Orr,* 295 U. S. 243 (1935). The distinction here is an obvious one; here the petitioners "owe" nothing to the Government. The statutory provision with which we are concerned can best be described as a sanction imposable upon the petitioners by the Government because of their conduct by which their debts to others came into being. Inasmuch as governmental sanctions are not regarded as debts even when they require monetary payments, *Parker* v. *United States,* 153 F. 2d 66, 71 (1 Cir. 1946); *In re Moore,* 111 Fed. 145 (W. D. Ky. 1901), it is obvious that petitioners here do not owe a debt to the Government. Nothing could be more ridiculous than to hold that an imposable sanction upon a bankrupt's actions unrelated to a debt owed to the Government would be a "provable debt" the bankrupt could render unenforceable by obtaining a discharge in bankruptcy. Thus there is no direct conflict between the Commodities Act and the provisions of the Bankruptcy Act in this particular.

Petitioners further claim that even if these provisions of the Commodities Act do not conflict with any express pro-

visions of the Bankruptcy Act they conflict with its goals. They also claim that the institution of this proceeding below and the order entered therein were arbitrary and capricious and were improper exercises of the Secretary's discretion in view of the petitioners' discharges in bankruptcy and the report filed in the bankruptcy proceeding that there was no evidence of wrongdoing by the petitioners. We consider all these contentions together. We find nothing improper in the Department's action in instituting the proceeding, or in the Judicial Officer's order imposing the statutorily authorized sanctions, for we do not discover any unconscionable clash between the goals of the Commodities Act and the goals of the Bankruptcy Act.

The Bankruptcy Act is intended to relieve an honest debtor of liability for his past obligations and to allow him to start afresh. *Williams* v. *United States Fid. & Guar. Co.*, 236 U. S. 549, 554-55 (1915). The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

The measures which petitioners object to in the Commodities Act would seem, to some extent, to conflict with the policy of the Bankruptcy Act. They prevent petitioners from shortly making a fresh debt-free start in the industry in which they had been earning their livelihood, although they are entirely free, as far as the challenged statute is concerned, to enter any other occupation or business which appeals to them. Nevertheless, in the light of the purposes of the Commodities Act and the clearly recognized need to

have financially responsible persons as licensees or employees of licensees under that Act, the extent of encroachment of the Commodities Act upon the goals of the Bankruptcy Act cannot be regarded as unconscionable or excessive. We find no cases involving alleged conflicts between the Bankruptcy Act and other federal legislation, but there are a number of reported cases that hold that reasonable measures provided for in state statutes which impose penalties on bankrupts are not invalid under the Supremacy Clause, United States Constitution, Art. VI, cl. 2, despite some degree of conflict with the Bankruptcy Act. Even when a judgment debt has become unenforceable by the discharge in bankruptcy of the judgment debtor the United States Supreme Court has upheld state statutes which deprived discharged bankrupts of automobile driving privileges unless the bankrupts satisfied judgments that arose from highway accidents they caused. *Kesler* v. *Dep't of Pub. Safety*, 369 U. S. 153 (1962); *Reitz* v. *Mealey*, 314 U. S. 33 (1941). Similarly, the California courts have upheld a California statute which makes the bankruptcy of a building contractor a ground for disciplinary action against him to the extent of suspending or revoking his contractor's license. *Tracy* v. *Contratcors' State License Board*, 407 P. 2d 865, 47 Cal. Rptr. 561 (Sup. Ct. 1965) (en banc); *Hopkins* v. *Contractors' State License Board*, 49 Cal. Rptr. 917 (Dist. Ct. App. 1966); *Hope* v. *Contractors' State License Board*, 39 Cal. Rptr. 514 (Dist. Ct. App. 1964). It would seem that the principle of these cases involving the application of the Supremacy Clause to a supposed conflict between state and federal statutes would apply *a fortiori* to a supposed conflict between two federal statutes of equal dignity. We cannot lightly infer that Congress intended to exempt bankrupts from being subject to these provisions of the Commodities Act when such an exemption would be extremely damaging to the goal of the Commodities Act that only financially responsible persons

should be engaged in the businesses subject to the Act. Our judgment is supported by the fact that other provisions of the Perishable Agricultural Commodities Act contain specific references to bankruptcy, see 7 U. S. C. §§499d(a), 499(b)(D); 499d(e). It is unlikely that Congress would include references to bankruptcy in some portions of the Commodities Act and omit them from the portions relevant to this case if Congress had intended that the provisions challenged here would be affected by the bankruptcy of persons subject to them. See *T. I. M. E., Inc.* v. *United States*, 359 U. S. 464 (1959); *Lang* v. *Comm'r*, 289 U. S. 109 (1933).

Finally, petitioners challenge the constitutionality of Section 499h of the Perishable Agricultural Commodities Act on several grounds. They claim it violates Article I, Section Nine of the United States Constitution, and the Fifth and Eighth Amendments. We do not understand them to challenge §499h(a)[4] which provides only for suspension and revocation of licenses and is clearly within the power of the federal Government in the exercise of its power over interstate commerce. *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 453 (7 Cir. 1943); see *Eastern Prod-*

[4] 7 U. S. C. §499h(a) reads as follows:

§499h. Grounds for suspension or revocation of license.

(a) Authority of Secretary.

Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

uce Co. v. *Benson*, 278 F. 2d 606 (3 Cir. 1960). The challenge is directed toward the harsher restriction of §499h(b) which prohibits any licensee under the Act from employing any person who had been responsibly connected with any person who was found to have committed flagrant or repeated violations of Section 499b. As we have explained earlier this provision bars petitioners from employment in any capacity in the perishable commodities industry for a period of at least one year.

Petitioners claim this provision violates their Fifth Amendment right to earn a livelihood in the common occupations of the community, *Truax* v. *Raich*, 239 U. S. 33 (1915), but the Constitution does not guarantee an unrestricted privilege to engage in business or a privilege to conduct a business as one pleases. *Nebbia* v. *New York*, 291 U. S. 502, 527-28 (1934). Undoubtedly the perishable commodities industry is an industry subject to reasonable congressional regulation. See *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606 (3 Cir. 1960). Conceding Congress's undoubted right to regulate the industry petitioners question whether the right to regulate gives Congress the right to provide that the Secretary of Agriculture may exclude persons in petitioners' position from all employment in the industry.

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in the business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all

employment in the industry.[5] While admittedly the result Congress desired could be harsh in some cases, we cannot say that Section 499h(b) is not reasonably designed to achieve the desired Congressional purpose. See *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934).

An analogous situation to this was presented to the New York Court of Appeals in *Bradley* v. *Waterfront Comm'n of N. Y. Harbor*, 12 N. Y. 2d 276, 239 N. Y. S. 2d 97 (1963). Section 8 of the New York Waterfront Commission Act which forbids unions from collecting dues from waterfront employees if any of the unions officers had been convicted of a felony was upheld by the United States Supreme Court in *De Veau* v. *Braisted*, 363 U. S. 144 (1960). Discovering that the former officers continued to dominate the unions as "employees," the New York Legislature amended Sec-

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[5] H. R. Rep. No. 1546, 87th Cong. 2d Sess. (1962) states:

> . . . Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had had active licenses. As amended, section 8(b) [499h(b)] would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

See Hearings on H. R. 5023 before the Subcommittee on Domestic Marketing of the House Committee on Agriculture, 87th Cong., 1st Sess. (1961); Hearings on S. 1037 Before a Subcommittee of the Senate Committee on Agriculture and Forestry, 87th Cong., 1st Sess. (1961).

tion 8 so as to extend the section's application to employees of the union as well as to the union officers. The court in *Bradley* had no difficulty in holding that this amendment to the statute did not violate due process because the amendment was no more than was necessary in order to carry out the original objectives of the statute.

Our conclusion that §499h(b) does not violate the Fifth Amendment is bolstered by *Birkenfield* v. *United States*, 369 F. 2d 491 (3 Cir. 1966). In that case Birkenfield was subjected to the sanctions of Section 499h(b) when Fort Pitt Tomato & Produce Co. (Fort Pitt) of which Birkenfield had been treasurer, director, and an owner of more than 10% of the outstanding stock, was found to have failed to pay a reparation award under Section 499g. Though he had been an officer and a director of Fort Pitt and had owned more than one tenth of its stock, Birkenfield claimed that he had been only a nominal officer or stockholder, actual authority being vested in others, and therefore he was not "responsibly connected" with Fort Pitt. He maintained he was deprived of due process because he was not granted a hearing on the issue. The court held that Birkenfield was not entitled to a hearing as he was obviously within the statutory definition of one "responsibly connected," and also held that this "per se" standard was not unconstitutional in view of the purpose of the statute to prevent persons from circumventing the Act by designating themselves as employees while they actually held more responsible positions.

Petitioners' next constitutional objection is that Section 499h(b) constitutes a cruel and unusual punishment in violation of the Eighth Amendment. We find no merit in this. While this constitutional protection may have been extended beyond technically criminal sanctions to those criminal in nature, *Trop* v. *Dulles*, 356 U. S. 88 (1958), it is not

applicable to purely civil penalties. *United States* v. *Strangland*, 242 F. 2d 843, 848 (7 Cir. 1957). In any event, as the sanction serves a valid public purpose, one who is denied the right to employment in one limited industry for a period of one or two years cannot be considered to have been cruelly or unusually punished. See *Pierce* v. *Securities & Exchange Commission*, 239 F. 2d 160 (9 Cir. 1956).

Petitioners' last claim is that Section 499h(b) is a bill of attainder in violation of Article I, Section Nine of the United States Constitution. They cite *United States* v. *Brown*, 381 U. S. 437 (1965) in support of this. We find the *Brown* case clearly distinguishable. It involved a statute making it a crime for a member of the Communist Party to serve as an officer of a labor union. The Court held that the statute was invalid as a bill of attainder because it specifically named Communist Party members as those subject to the provisions and did not set forth a generally applicable rule applying to anyone who commits certain acts or possesses certain characteristics. *United States* v. *Brown, supra* at 450. The statute here challenged, Section 499h(b) of the Commodities Act, is squarely within the category of disabilities permissible under *Brown*. It does not name or describe petitioners or any group to which they belong; it prohibits a course of conduct; it prohibits a violation of a statute by one licensed under the statute with whom petitioners may be responsibly connected. Petitioners' actions brought them within the operation of the statute, and sanctions imposed upon them for those actions are proper exercises of governmental regulatory power. Petitioners were not automatically condemned by the statute; they incurred the penalties of the statute only after an administrative determination which was subject to judicial review by this court. Section 499h(b) is not invalid as a bill of attainder.

Petition denied. Order below affirmed.

APPENDIX B

Statutes Involved

7 U. S. C. §499b

Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

7 U. S. C. §499h

Grounds for suspension or revocation of license—Authority of Secretary

* * *

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so

the approval of employment shall automatically terminate. The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 9. • • •

No Bill of Attainder or ex post facto Law shall be passed.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

APPENDIX C

Testimony of George R. Grange, a Deputy Director of the United States Department of Agriculture in a Hearing Before a Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 87th Congress, First Session S. 1037. Printed by the U. S. Government Printing Office, 1961

"Mr. Grange: The act now provides that a person who has had his license revoked, for example, cannot be employed in a 'responsible position' with another licensee for a minimum period of 1 year, and after 1 year the Secretary may approve such employment if the employer posts a satisfactory surety bond.

The difficulty that we have run into, Senator, in applying this provision of the statute is that, if the employer and employee wished to hide their working relationship, we have found that it is virtually impossible to get acceptable evidence that the employee is, in fact, operating in a responsible position.

I will give you an illustration. It is a current one that we have right with us today.

A man had his license suspended for failure to pay a reparation order, so he went out of business because he did not have an effective license.

His wife, who was a secretary of a business firm in town, applied for a license. We granted her a license because we had no grounds for refusing his wife the license. She hired her husband. We questioned her as to whether or not he was in a responsible position, and we had an investigator look into it.

She maintained that he was driving the truck and he was not in a responsible position.

We knew that she had no previous contact with the produce business. It stretched our imagination quite a bit to try to believe that her husband was not occupying a responsible position. So when she left there a few months ago to take her old job back as secretary, we said:

"Well, enough is enough. We think that this is now 'responsible'," and we filed a complaint requiring her to post a surety bond or to discharge her husband from the position. We are now in the process of getting the thing settled.

I think, incidentally, the outcome of this particular one is going to be that he will pay off the two reparation orders that had previously been issued against him rather than post the bond. That is just an example of what we get into."

APPENDIX D

H. R. Rep. No. 1546, 87th Cong. 2d Sess. (1962)

. . . Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had had active licenses. As amended, section 8(b) [499h(b)] would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

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